

Jamincorp International Merchant
Bank Limited

Appellant

v.

The Minister of Finance

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE
8TH JUNE 1987, DELIVERED THE 18TH JUNE 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH

LORD TEMPLEMAN

LORD ACKNER

LORD OLIVER OF AYLERTON

SIR DUNCAN McMULLIN

[Delivered by Lord Oliver of Aylerton]

The appellant company (to which their Lordships will refer as "the Company") is a company engaged in the business of taking deposits in Jamaica and is currently subject to a winding-up petition at the suit of the Minister of Finance.

With the leave of the Court of Appeal of Jamaica the Company appealed from a judgment of the Court of Appeal allowing an appeal by the respondent from a decision of Mr. Justice Wolfe in the High Court. At the conclusion of the hearing, their Lordships agreed humbly to advise Her Majesty in Council that the appeal should be dismissed and indicated that they would give their reasons later. This they now do.

Section 323(4) of the Companies Act of Jamaica incorporates into the company law of Jamaica the provisions of the United Kingdom Companies (Winding-up) Rules 1949. For the purposes of the present appeal there are only two relevant rules, namely, rules 30 and 33. They are in the following terms:-

"30. Every petition shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient *prima facie* evidence of the statements in the petition."

"33. After a petition has been presented, the petitioner, or his solicitor shall, on a day to be appointed by the Registrar, attend before the Registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly filed, and that the provisions of the Rules as to petitions have been duly complied with by the petitioner. No order shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the Registrar at the time appointed, and satisfied him in manner required by this Rule."

The Protection of Depositors Act (No. 11 of 1966) imposes certain powers and duties upon the Minister of Finance in relation to persons carrying on the business of accepting or advertising for deposits in Jamaica, and section 11 authorises the Minister to present a winding-up petition under the Companies Act in respect of a deposit-taking company which, *inter alia*, has failed to deliver accounts or is unable to pay sums due and payable to its depositors. It also imposes upon the Minister a duty to appoint an Inspector whose duty it is to ensure compliance with the Act and to report to the Minister. Under subsection (2) of section 12 of the Act the Inspector may, with the approval of the Minister, appoint another person to assist him in the performance of his functions.

On 7th October 1986 the Minister filed with the Court a petition to wind up the Company on the ground that it was unable to repay its depositors, was insolvent and had failed to deliver accounts. It is not suggested that the presentation of the petition was unauthorised or improper. It was verified by an affidavit of a Mr. Oscar Simpson, a person appointed under section 12(2) of the Protection of Depositors Act to assist the Inspector. It is not suggested that the Minister himself could have had any personal knowledge of the matter alleged in the petition or that anyone other than Mr. Simpson had any such

personal knowledge. The petition was duly advertised. It was duly served and an affidavit of service was filed. The 6th November 1986 was appointed for the hearing, but the Director of State Proceedings, who was responsible for the conduct of the petition, did not obtain from the Registrar, and the Registrar did not nominate, an appointment to attend before her pursuant to rule 33. Consequently when the petition came on for hearing, although all the steps which ought to have been demonstrated to the Registrar had been taken, the Registrar had not satisfied herself that they had in fact been taken. Consequently rule 33 had not been complied with. In the meantime on 15th October 1986 a Provisional Liquidator was appointed. When the petition came to be heard by Wolfe J. counsel for the petitioner accepted that rule 33 had not been complied with and sought an adjournment. That was opposed and was refused by the judge who made an order dismissing the petition with costs and discharging the Provisional Liquidator. He reserved the question of damages to a date to be fixed by the Registrar and directed that no further petition to wind up the company should be presented prior to the payment of the costs and damages.

The learned judge refused the adjournment sought because, so it appears, he considered that the affidavit of Mr. Simpson was insufficient to comply with rule 30 since it ought to have been by the Minister personally and that the failure to make an appointment with the Registrar to satisfy her that the steps mentioned in rule 33 had been taken was tantamount to an abandonment of the petition. His view seems to have been that once the hearing date had arrived without rule 33 having been complied with the petition became a nullity and inherently and incurably defective. To grant an adjournment would therefore, he thought, serve no purpose save that of preserving the order for the appointment of the Provisional Liquidator whilst a new petition was prepared and filed. That was not an indulgence that he was prepared to grant. Rule 33 was, he thought, mandatory and not merely directory and there was no possibility of allowing any further time for compliance once the date originally fixed for the hearing had been allowed to pass.

The learned judge's reasoning was, with respect to him, palpably fallacious, although it ought to be said that he received no help at all from either counsel before him, both of whom appear to have concurred in asserting that the position was, indeed, as the judge conceived it to be. His decision was reversed by the Court of Appeal on 20th November 1986. That court held unanimously that both rule 30 and rule 33 were directory only and that the learned judge's exercise of his discretion against an adjournment had therefore been based upon a

misconception. They also held that there could, in the circumstances of the instant case, be no objection to the reception of the affidavit of Mr. Simpson verifying the petition. Manifestly the Minister could not be expected to have personal knowledge of every matter dealt with by his Department or the Inspector and his assistant or assistants under the Protection of Depositors Act. It would be entirely inappropriate for an affidavit verifying the petition to be sworn by the Minister personally and the court's decision is entirely in line with that of Brightman J. in *Re Golden Chemical Products Limited* [1976] 2 All ER. 543 and with other cases in which the court has accepted evidence on behalf of a non-corporate petitioner not sworn by that petitioner personally but with his authority. Accordingly the appeal was allowed. The appointment of the Provisional Liquidator was restored and directions were given that the petitioner's attorney attend before the Registrar in accordance with rule 33. Directions were also given for further evidence and for trial.

From that decision the Company appeals with the leave of the Court of Appeal to Her Majesty in Council. On granting leave the Court of Appeal certified three questions as being questions of great general and public importance. They were expressed as follows:-

- "(a) Whether the provisions of section 33 of the Companies (Winding-up) Rules 1949 are mandatory and therefore cannot be implemented after the date set for hearing of the petition.
- (b) Whether on the true construction of Rule 30 of the Companies (Winding-up) Rules 1949 and the provisions of sections 11 and 12 of the Protection of Depositors Act 1966, the deponent was authorised to swear to the Affidavit verifying the petition herein.
- (c) Whether the Court of Appeal ought to substitute its discretion for that of the first instance Judge who has not erred in principle in the exercise of a discretionary power whose decision was not wrong in law and did not result in any injustice."

On the first and third questions Mr. Carl Rattray, on behalf of the Company, has said all that can be said in an appeal which is and was from the outset quite hopeless. The Court of Appeal was clearly right in saying that rule 33, which is primarily an administrative provision for the benefit of the court, is directory only and once it is conceded, as Mr. Rattray has felt bound to concede, that the court

has a discretion to grant an adjournment at the hearing to enable rule 33 to be complied with, it has also to be conceded that the learned judge's refusal of an adjournment was based on a wholly wrong appreciation of the legal position. That really concludes the appeal, but Mr. Rattray has sought to salvage the position by what he has described as a constitutional point on the second question raised. He concedes that although an affidavit verifying the petition could properly be made and accepted if sworn by a civil servant in the Minister's Department or, it seems, by the Inspector himself, an assistant appointed with the Minister's approval under section 12(2) of the Act to assist the Inspector lacks what Mr. Rattray describes as the "constitutional nexus" required to enable him to swear the affidavit even though he may be the only person with any personal knowledge of the relevant facts. Their Lordships have no hesitation in rejecting this submission and in holding that the Court of Appeal of Jamaica was right in concluding that it was open to the court to receive the evidence of a deponent other than the petitioner personally and that the instant case was a case where this could properly be done. The three questions certified by the Court of Appeal should therefore be answered as follows:-

1. No.
2. Yes.
3. Does not arise in the form postulated.

The appellant must pay the costs of the respondent before the Board.

